

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B03

PLR-117713-09

Date:

September 28, 2009

### Legend

Taxpayer =

Date 1 =

Date 2 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

Accountant =

x months =

Dear \_\_\_\_\_ :

This is in response to a letter from your authorized representative, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations for you to make an election under section 475(f) of the Internal Revenue Code (Code) to use the mark-to-market method of accounting beginning with Year 5. The letter was filed on Date 2. Taxpayer uses a calendar year in preparing his federal income tax returns and uses the cash receipts and disbursements method of accounting.

Taxpayer trades securities from his home office and began trading securities in Year 1. Taxpayer represents he has continuously qualified as a trader in securities, as that term is used in section 475 (f)(1), since Year 2.<sup>1</sup> In Year 4, Taxpayer formed a partnership with his children to teach the children how to trade securities. Taxpayer trades securities for his own account and for the partnership. The bulk of the partnership is owned by Taxpayer. Taxpayer has not requested a ruling regarding the partnership.

During Year 2 through Year 5, Taxpayer employed Accountant, a Certified Public Accountant, to prepare his tax returns and provide tax advice. During that time, Accountant received annual reports of Taxpayer's and the partnership's trading activities. Taxpayer frequently discussed tax planning strategies with Accountant. In January of Year 5, Taxpayer informed Accountant that while he had a "large" realized tax gain for Year 4, he was going to have a "huge" loss for Year 5. Further, Taxpayer informed Accountant that he was expecting to liquidate an insurance policy during Year 5 or Year 6, which would generate a sizable gain in the year of liquidation.

Taxpayer represents that in June of Year 5, he began calling the Internal Revenue Service (Service) regarding his financial issues and seeking guidance. During one conversation with the Service, Taxpayer was asked if he had made an election pursuant to section 475(f) to use the mark-to-market method of accounting and it was explained to Taxpayer why this was relevant. This was the first time Taxpayer had heard of such an election. Subsequent to this conversation, Taxpayer discussed the availability of the election with Accountant. Taxpayer represents that Accountant acknowledged that he had heard of the election but was not quite sure how it worked. Accountant has provided a single line Affidavit, under penalties of perjury, that he was not aware of the provisions of section 475.

In Year 2, Year 3 and Year 4, Taxpayer experienced a net taxable gain in each year for his trading business, but in Year 5, Taxpayer experienced a net taxable loss for his trading business.

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<sup>1</sup> We are treating Taxpayer as a trader in securities solely for purposes of this ruling. We have not considered, and therefore express no opinion, whether Taxpayer qualifies as a trader in securities.

## LAW AND ANALYSIS

Section 475(f) provides that a taxpayer engaged in a trade or business as a trader in securities may elect to apply the mark-to-market method of accounting to securities held in connection with such trade or business. See section 475(f)(1). Section 7805(d) provides that, except to the extent otherwise provided by the Code, any election shall be made at such time and in such manner as the Secretary shall prescribe.

On February 16, 1999, the Service published Rev. Proc. 99-17, 1999-1 C.B. 503, (section 6 superseded by Rev. Proc. 99-49, 1999-2 C.B. 725, which was clarified, modified, amplified, and superseded by Rev. Proc. 2002-9, 2002-1 C.B. 327, which was clarified, modified, amplified, and superseded by Rev. Proc. 2008-52, 2008-2 C.B. 587). Rev. Proc. 99-17 provides the exclusive procedure for traders in securities to make an election to use the mark-to-market method of accounting under section 475(f). Section 5.03(1) of Rev. Proc. 99-17 provides, in relevant part, that taxpayers (other than a taxpayer for which no federal income tax return was required to be filed for the taxable year immediately preceding the election year) make an election under section 475(f) for a tax year beginning on or after January 1, 1999, by filing a statement no later than the due date (without regard to extensions) of the original federal income tax return for the taxable year immediately preceding the election year. The statement must be attached to either that return or to a request for an extension of time to file that return. Section 5.03 of Rev. Proc. 99-17. The statement must describe the election being made, the first taxable year for which the election is effective, and the trade or business for which the election is made. Section 5.04 of Rev. Proc. 99-17.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Sections 301.9100-3(a) through (c)(1)(ii) set forth rules that the Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all

years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(b)(3) provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. This section provides, in relevant part, that the interests of the Government are deemed to be prejudiced by granting an extension of time, except in unusual and compelling circumstances, if the accounting method regulatory election is subject to the procedure described in § 1.446-1(e)(3)(i) (requiring the advance written consent of the Commissioner) or if the accounting method regulatory election for which relief is requested requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made).

Section 4 of Rev. Proc. 99-17 states that the election under section 475(f) determines the method of accounting an electing trader is required to use for federal income tax purposes for securities subject to the election. Because the election is integrally related to the change in accounting method to mark-to-market, it is an accounting method regulatory election subject to § 301.9100-3(c)(2).

Rev. Proc. 2008-52 provides procedures by which a taxpayer may obtain automatic consent to change to the mark-to-market accounting method. However, the automatic change applies to a taxpayer only if the taxpayer has made a valid election under section 475(f) and is required to change its method of accounting to comply with the election. Section 23.01 of the Appendix to Rev. Proc. 2008-52.

Taxpayer requests an extension of time to make an accounting method regulatory election that is subject to the provisions of § 301.9100-3. Relief under this section of the Regulations will only be granted when a taxpayer provides evidence satisfactory to the Commissioner that the taxpayer acted reasonably and in good faith, and the granting of relief will not prejudice the interests of the Government. If specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Taxpayer is deemed to have not acted reasonably and in good faith. Under such circumstances § 301.9100-3(b)(3) provides that the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight. Without such proof the taxpayer is deemed to have not acted reasonable or in good faith.

In this case, Taxpayer did not file his request for relief until Date 2. The election was due by Date 1. The late filing provides Taxpayer the benefit of more than x months of hindsight to review and consider the results of his securities trading transactions and whether he would benefit by making the election. Specifically, had Taxpayer made a timely election he would not have had the benefit of knowing the results of his security transactions after the election's due date and he would not have had this time to act on that knowledge. Therefore, Taxpayer has failed to demonstrate his decision to seek relief did not involve hindsight, and in accordance with § 301.9100-3(b)(3), Taxpayer is deemed to have not acted reasonably or in good faith.

Based on the facts and representations submitted, we conclude that Taxpayer has not satisfied the requirements for our granting a reasonable extension of time to make an election under section 475(f) to use the mark-to-market method of accounting. Specifically, Taxpayer has failed to demonstrate he acted reasonably and in good faith.

## **CONCLUSION**

Taxpayer's request for an extension of time to make the section 475(f) election for Year 5 is denied. Because Taxpayer's request for relief is denied pursuant to section 301.9100-3(b), for lack of reasonable action and good faith, we will not consider other reasons why relief may have been denied.<sup>2</sup>

No opinion is expressed as to the tax treatment of the transaction under the provisions of any other sections of the Code and regulations, which may be applicable thereto.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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<sup>2</sup> For example, Taxpayer was denied relief because he failed to demonstrate reasonableness and good faith, as required by § 301.9100-3(b), but had he met this requirement, § 301.9100-3(c)(2) requires the existence of unusual and compelling circumstances. In reaching our conclusion, it was not necessary for us to consider if unusual and compelling circumstances existed. As a result, even if Taxpayer had demonstrated reasonableness and good faith, he still must show unusual and compelling circumstances.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,  
/s/

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Robert B. Williams  
Senior Counsel, Branch 3  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

Enclosures (2)  
Copy of this letter  
Copy for section 6110 purposes

cc: